

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

VOL. 32

NOVEMBER 18, 1998

NO. 46

This issue contains:

U.S. Customs Service

T.D. 98-85 Through 98-87

General Notices

**DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE**

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 111

(T. D. 98-85)

ANNUAL USER FEE FOR CUSTOMS BROKER PERMIT; GENERAL NOTICE

AGENCY: U.S. Customs Service Department of the Treasury.

ACTION: Notice of due date for broker user fee.

SUMMARY: This is to advise Customs brokers that for 1999 the annual user fee of \$125 that is assessed for each permit held by an individual, partnership, association or corporate broker is due by January 8, 1999. This announcement is being published to comply with the Tax Reform Act of 1986.

DATES: Due date for fee: January 8, 1999.

FOR FURTHER INFORMATION CONTACT: Adline Tatum, Entry & Broker Compliance (202) 927-0380.

SUPPLEMENTARY INFORMATION:

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub.L. 99-272) established that an annual user fee of \$125 is to be assessed for each Customs broker permit held by an individual, partnership, association, or corporation. This fee is set forth in the Customs Regulations in section 111.96 (19 CFR 111.96).

Customs Regulations provides that this fee is payable for each calendar year in each Broker district where the broker was issued a permit to do business by the due date which will be published in the Federal Register annually. Broker districts are defined in the General Notice published in the Federal Register, Volume 60, No. 187, September 27, 1995.

Section 1893 of the Tax Reform Act of 1986 (Pub.L. 99-514), provides that notices of the date on which a payment is due of the user fee for each broker permit shall be published by the Secretary of Treasury in the Federal Register by no later than 60 days before such due date. This document notifies brokers that for 1999, the due date for payment of the user fee is January 8, 1999. It is expected that annual user fees for bro-

kers for subsequent years will be due on or about the third of January of each year.

Dated: November 3, 1998.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, November 6, 1998 (63 FR 60043)]

(T.D. 98-86)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR OCTOBER 1998

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): October 12, 1998.

Greece drachma:

October 1, 1998	\$.003510
October 2, 1998	.003521
October 3, 1998	.003521
October 4, 1998	.003521
October 5, 1998	.003509
October 6, 1998	.003521
October 7, 1998	.003576
October 8, 1998	.003578
October 9, 1998	.003525
October 10, 1998	.003525
October 11, 1998	.003525
October 12, 1998	.003525
October 13, 1998	.003540
October 14, 1998	.003536
October 15, 1998	.003567
October 16, 1998	.003593
October 17, 1998	.003593
October 18, 1998	.003593
October 19, 1998	.003577
October 20, 1998	.003554
October 21, 1998	.003557
October 22, 1998	.003565
October 23, 1998	.003577
October 24, 1998	.003577
October 25, 1998	.003577
October 26, 1998	.003576

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for
October 1998 (continued):

Greece drachma (continued):

October 27, 1998	
October 28, 1998	\$0.003552
October 29, 1998	.003546
October 30, 1998	.003536
October 31, 1998	.003549

South Korea won:

October 1, 1998	
October 2, 1998	\$0.000719
October 3, 1998	.000719
October 4, 1998	.000719
October 5, 1998	.000719
October 6, 1998	.000720
October 7, 1998	.000720
October 8, 1998	.000724
October 9, 1998	.000733
October 10, 1998	.000749
October 11, 1998	.000749
October 12, 1998	.000749
October 13, 1998	.000749
October 14, 1998	.000741
October 15, 1998	.000741
October 16, 1998	.000749
October 17, 1998	.000754
October 18, 1998	.000754
October 19, 1998	.000754
October 20, 1998	.000753
October 21, 1998	.000752
October 22, 1998	.000754
October 23, 1998	.000755
October 24, 1998	.000756
October 25, 1998	.000756
October 26, 1998	.000756
October 27, 1998	.000760
October 28, 1998	.000757
October 29, 1998	.000758
October 30, 1998	.000759
October 31, 1998	.000757

Taiwan N.T. dollar:

October 1, 1998	
October 2, 1998	\$0.029095
October 3, 1998	.029369
October 4, 1998	.029369
October 5, 1998	.029369
October 6, 1998	.029630
October 7, 1998	.029815
October 8, 1998	.029940
October 9, 1998	.030303
October 10, 1998	.030349
October 11, 1998	.030349
October 12, 1998	.030349
October 13, 1998	.030349
October 14, 1998	.030157
October 15, 1998	.030030
October 16, 1998	.030257
	.030488

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for
October 1998 (continued):

Taiwan N.T. dollar (continued):

October 17, 1998	.....	\$0.030488
October 18, 1998	.....	.030488
October 19, 1998	.....	.030312
October 20, 1998	.....	.030303
October 21, 1998	.....	.030303
October 22, 1998	.....	.030377
October 23, 1998	.....	.030340
October 24, 1998	.....	.030340
October 25, 1998	.....	.030340
October 26, 1998	.....	.030303
October 27, 1998	.....	.030581
October 28, 1998	.....	.030722
October 29, 1998	.....	.030694
October 30, 1998	.....	.030788
October 31, 1998	.....	.030788

Dated: November 2, 1998.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 98-87)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR OCTOBER 1998

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 98-84 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): October 12, 1998.

Australia dollar:

October 13, 1998	.....	\$0.627300
October 14, 1998	.....	.629400
October 15, 1998	.....	.631000
October 16, 1998	.....	.632700
October 17, 1998	.....	.632700
October 18, 1998	.....	.632700
October 19, 1998	.....	.632800
October 20, 1998	.....	.628500
October 21, 1998	.....	.627500

FOREIGN CURRENCIES—Variances from quarterly rates for October 1998
(continued):

Japan yen:

October 7, 1998	\$0.008066
October 8, 1998	.008414
October 9, 1998	.008547
October 10, 1998	.008547
October 11, 1998	.008547
October 12, 1998	.008547
October 13, 1998	.008414
October 14, 1998	.008384
October 15, 1998	.008511
October 16, 1998	.008662
October 17, 1998	.008662
October 18, 1998	.008662
October 19, 1998	.008737
October 20, 1998	.008468
October 21, 1998	.008558
October 22, 1998	.008483
October 23, 1998	.008470
October 24, 1998	.008470
October 25, 1998	.008470
October 26, 1998	.008415
October 27, 1998	.008432
October 28, 1998	.008506
October 29, 1998	.008525
October 30, 1998	.008587
October 31, 1998	.008587

New Zealand dollar:

October 13, 1998	\$0.541000
October 14, 1998	.539500
October 15, 1998	.531200
October 16, 1998	.535700
October 17, 1998	.535700
October 18, 1998	.535700
October 19, 1998	.535000
October 30, 1998	.529500
October 31, 1998	.529500

South Africa, Republic of, rand:

October 9, 1998	\$0.172429
October 10, 1998	.172429
October 11, 1998	.172429
October 12, 1998	.172429
October 14, 1998	.176367
October 15, 1998	.176211
October 16, 1998	.175528
October 17, 1998	.175528
October 18, 1998	.175528
October 19, 1998	.176367
October 20, 1998	.173913
October 21, 1998	.175593
October 22, 1998	.174672
October 23, 1998	.174216
October 24, 1998	.174216
October 25, 1998	.174216
October 26, 1998	.175516
October 27, 1998	.173310

FOREIGN CURRENCIES—Variances from quarterly rates for October 1998
(continued):

South Africa, Republic of, rand (continued):

October 28, 1998	\$0.173913
October 29, 1998 .....	.175131
October 30, 1998178571
October 31, 1998178571

Switzerland franc:

October 10, 1998	\$0.773096
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Thailand baht (tical):

October 23, 1998	\$0.026674
October 24, 1998026674
October 25, 1998026674
October 26, 1998 .....	.026560
October 27, 1998 .....	.026731
October 28, 1998 .....	.027100
October 29, 1998 .....	.027100
October 30, 1998 .....	.027174
October 31, 1998 .....	.027174

Dated: November 2, 1998.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING SURGICAL INSTRUMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that Customs has issued a final determination concerning the country of origin of certain surgical instruments which are being offered to the Department of Veterans Affairs under a Federal Supply contract. The final determination found that based upon the facts presented, the country of origin of the surgical instruments is Germany.

DATE: The final determination was issued on November 2, 1998. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of November 6, 1998.

FOR FURTHER INFORMATION CONTACT: Monika Brenner, Special Classification and Marking Branch, Office of Regulations and Rulings (202-927-1675).

SUPPLEMENTARY INFORMATION:

Notice is hereby given that on November 2, 1998, pursuant to Subpart B of Part 177, Customs Regulations (19 CFR Part 177, Subpart B), Customs issued a final determination concerning the country of origin of certain surgical instruments which are being offered to the Department of Veterans Affairs under a Federal Supply contract. This final determination was issued at the request of one of the offerors under procedures set forth at 19 CFR Part 177, Subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511-18). The final determination concluded that, based upon the facts presented, German surgical instrument forgings are not substantially transformed in Malaysia as a result of various machining and some assembly processes. Accordingly, the country of origin of the surgical instruments is Germany. This document gives notice pursuant to section 177.29, Customs Regulations (19 CFR 177.29), of that final determination. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek

judicial review of this final determination within 30 days of November 6, 1998.

Dated: November 2, 1998.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations & Rulings.)

[Published in the Federal Register, November 6, 1998 (63 FR 60043)]

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 2, 1998.
MAR-2-05 RR:CR:SM 561141 MLR
Category: Marking

STUART E. BENSON, ESQ.
FARKAS & MANELLI, PLLC
2000 M Street, N.W.
7th Floor
Washington, DC 20036-3307

Re: U.S. Government Procurement; Final Determination; Country of origin of Surgical Instruments; forging; substantial transformation; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); 19 CFR 177.21.

DEAR MR. BENSON:

This is in reference to your letter of September 9, 1998, requesting a final determination under Subpart B of Part 177, Customs Regulations 19 CFR 177.21 *et seq.* Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2411 *et seq.*), the Customs Service issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated foreign country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government. Samples were submitted with your request.

This final determination concerns the country of origin of certain surgical instruments made by Aesculap AG (hereinafter "AAG") in Germany and imported by Aesculap, Inc. (hereinafter "AIC"), a U.S. company, and which AIC supplies under a Federal Supply Schedule contract with the Department of Veterans Affairs. Accordingly, AIC is a party-at-interest within the meaning of 19 CFR 177.22(d)(1), and is entitled to request this final determination.

Facts:

AIC requests this final determination for the prospective importation of certain hand-held surgical instruments. The instruments are forged at AAG's facility in Germany from stainless steel made in Germany. Strips of steel are sheared off in appropriate sizes and heated in a blast furnace. They are then forged, which entails hot-stamping or pressing the steel over a mold. The forged parts are annealed, which entails heating and then cooling slowly to prevent brittleness. Excess metal (flashing) is then removed by stamping. The German forgings are then shipped to Malaysia.

In Malaysia, for parts requiring teeth, the jaw parts are milled. For curved instruments, the parts are shaped. For instruments consisting of one piece, such as blade handles, the

parts are machined. For instruments with two pieces (such as scissors or forceps), ratchets are milled and shanks are shaped; male box locks are milled; female box locks are broached and filed; female box locks are cold-stretched and filed; male box locks are fitted into place; the two parts are pressed together, adjusted and aligned; holes for the pins are drilled, and the pins are press-fitted and finished flat and smooth with the boxes. The instruments then undergo a quality-assurance check for compliance with dimensions and material integrity. The instruments are then tempered in a vacuum furnace, adjusted and aligned (two piece instruments only) and polished.

Most of the instruments are then shipped to Germany for quality assurance checks of their dimensions, material integrity, function and uniform finish. They then undergo marking, packaging, and labeling before shipment to the U.S. Some instruments undergo final quality assurance, marking, packaging and labeling in Malaysia.

It is stated that some forgings are used by AAG to make just one type of instrument. However, some parts are used to make a limited number of forms of a type of instrument. For example, one particular forging can be used to produce four different types of delicate tissue forceps that are five inches in length: (1) Semken delicate forceps without teeth, (2) Semken delicate forceps with 1x2 teeth, (3) Semken delicate forceps with 2x3 teeth, and (4) Waugh delicate forceps with 1x2 teeth. It is stated that "Semken" and "Waugh" are names of instrument patterns. "Teeth" are placed at the very tip of the instrument. Instruments with 1x2 teeth have one tooth on one side and two on the other so that the single tooth fits between the two on the other side. Instruments with 2x3 teeth have two on one side and three on the other. Teeth are different from serrations, which are the lateral grooves found in some instruments from the tip to the box lock. It is stated that the delicateness and number of teeth vary according to the specific use in surgery. It is also stated that some forgings are shortened slightly by machining, for example to produce 5 1/2 inch forceps and 5 1/4-inch needle holders.

Issue:

Whether the surgical instruments are products of Germany or Malaysia.

Law and Analysis:

As prescribed under Title III of the Trade Agreements Act, the origin of an article not wholly the growth, product, or manufacture of a single country is to be determined by the rule of substantial transformation. 19 U.S.C. 2518(4). Such an article is not a product of a country unless it has been substantially transformed there into a new and different article of commerce with a name, character or use different from that of the article or articles from which it was transferred.

AIC claims that the surgical instruments are products of Germany based specifically on *National Hand Tool Corp. v. United States*, 3 CIT 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993), and Headquarters Ruling Letter (HRL) 558747 dated January 20, 1995; HRL 559847 dated January 2, 1997; and HRL 560239 dated June 17, 1997.

In *National Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993), the court considered sockets and flex handles which were either cold formed or hot forged into their final shape prior to importation, speeder handles which were reshaped by a power press after importation, and the grip of flex handles which were knurled in the U.S. The imported articles were then heat treated which strengthened the surface of the steel, and cleaned by sandblasting, tumbling, and/or chemical vibration before being electroplated. In certain instances, various components were assembled together which the court stated required some skill and dexterity. The court determined that the imported articles were not substantially transformed and that they remained products of Taiwan. In making its determination, the court focused on the fact that the components had been cold-formed or hot-forged "into their final shape before importation," and that "the form of the components remained the same" after the assembly and heat-treatment processes performed in the U.S. Although the court stated that a predetermined use would not necessarily preclude a finding of a substantial transformation, it noted that such determination must be based on the totality of the evidence. The court then concluded that no substantial change in name, character or use occurred as a result of the processing performed in the U.S.

In HRL 559847 January 2, 1997, Customs considered U.S.-origin stainless steel sheets cut into strips of suitable width, which were further cut into blanks. The blanks were then heated and hammer forged. The forgings were annealed and trimmed, and cold stamped to straighten the trimmed forgings. The forgings were then shipped to Pakistan where they

underwent milling operations to cut the box, rachet, and jaw serrations into the forceps; assembled; ground; filed; heat treated, including tempering and testing for hardness; acid pickled; polished; chemical cleaned; and buffed. It was held that inasmuch as the forgings resembled the shape and size of the completed instruments upon importation into Pakistan, the operations performed in Pakistan did not substantially transform the forgings into a new and different article of Pakistani origin. Accordingly, the origin of the finished instruments was the U.S. See also HRL 560441 dated November 18, 1997 (no substantial transformation when German rough forgings were machined, assembled, rough polished, heat treated, and cleaned in Hungary).

Although HRL 558747 dated January 20, 1995, involved the same type of processes as in this case, the German forgings in that case were shipped to the U.S. for assembly, cutting, and scaling down and then to Russia or Hungary (rather than just to Malaysia alone) for heat treatment, a final cleaning, and plating. However, it was also held that the processing in the U.S. did not substantially transform the surgical instrument forgings and neither did the finishing processes performed in Russia or Hungary. Therefore, the surgical instruments were required to be marked as products of Germany. A similar finding was made in HRL 560239.

We find the processes in this case to be similar to the ones considered in HRL 559847 and HRL 560441. Accordingly, pursuant to those rulings and *National Hand Tool*, we find that there is no substantial transformation of the forgings in Malaysia, and the country of origin of the finished instruments will be Germany. While we also note that some raw part forgings may be shortened to either make 5 1/2 inch forceps or 5 1/4-inch needle holders, in *National Hand Tool*, the reshaping of the speeder handle was not extensive enough to result in a substantial transformation. Therefore, in this situation, too, we find that the country of origin of the finished surgical instruments will be Germany.

Holding:

Based on the facts and samples presented, we find that the processing in Malaysia does not result in a substantial transformation of the German forgings. Therefore, the country of origin of the finished surgical instruments is Germany.

Notice of this final determination will be given in the Federal Register as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that Customs reexamine the matter anew and issue a new final determination. Any party-at-interest may, within 30 days after publication of the Federal Register notice referenced above, seek judicial review of this final determination before the Court of International Trade.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations & Rulings.)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 4, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
*Assistant Commissioner,
Office of Regulations and Rulings.*

PROPOSED MODIFICATION OF RULING LETTER RELATING
TO TARIFF CLASSIFICATION OF TOY SPYGLASS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of an article known as a "Peter Pan Spyglass" under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before December 18, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, General Classification Branch (202) 927-2404.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of an article known as a "Peter Pan Spyglass" under the HTSUS. Comments are invited on the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) C81752 dated December 9, 1997, Customs classified, among other things, an article identified as a "Peter Pan Spyglass" under subheading 9005.80.4040, HTSUS, as optical telescopes. NYRL C81752 is set forth as Attachment A. This classification decision resulted from a determination that the spyglass was designed to do a specific task, magnify.

Note 1(k) of Chapter 90, HTSUS, states that: "[t]his chapter does not cover: * * * [a]rticles of chapter 95." Therefore, if it is determined that the "Peter Pan Spyglass" is also designed for amusement, it is excluded from classification in heading 9005, HTSUS.

We are of the opinion that application of the factors enumerated in *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), *cert. denied*, 429 U.S. 979, for determining whether an article falls within a particular class or kind of good, together with the Chapter 95, Explanatory Notes confirm that, in addition to its magnification function, the "Peter Pan Spyglass" is designed for amusement. Therefore, by operation of Note 1(k) to Chapter 90, the spyglass is classified as a toy for tariff purposes.

Accordingly, Customs intends to modify NYRL C81752 to reflect the proper classification of the "Peter Pan Spyglass" under subheading 9503.90.0045, HTSUS, as "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: [o]ther: [o]ther toys and models." Proposed Headquarters Ruling Letter 961254 modifying NYRL C81752, is set forth in Attachment B.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 28, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, December 9, 1997.
CLA-2-90:RR:NC:MM:114 C81752
Category: Classification
Tariff Nos. 9005.80.4040, 9013.80.2000,
9503.49.0025, and 9503.90.0045

MS. JAMIE BOUCHER
McKENNA & CUNEO, L.L.P.
1900 K Street
Washington, DC 20006-1108

Re: The tariff classification of telescopes, hand magnifiers, toy crocodiles, and toy lanterns from China.

DEAR MS. BOUCHER:

In your letter dated November 14, 1997, on behalf of Simon Marketing, Inc., you requested a tariff classification ruling.

The telescope, also referred to as a spyglass, is composed of plastic and is approximately 4½ inches in height. It is designated as No. 00813-006.

The magnifying glass is composed of plastic and is a hand magnifier. It is approximately 4¾ inches in height and has a diameter of 1¾ inches. It is designated as No. 00813-009.

The toy crocodile is made of plastic and is approximately 4¾ inches in length and 2 inches in width. The item contains a toy compass. It is designated as No. 00813-003.

The toy lantern is made of plastic and is approximately 2¾ inches in height and 1 inch in width. It is designated as No. 00813-015.

The applicable subheading for the telescope will be 9005.80.4040, Harmonized Tariff Schedule of the United States (HTS), which provides for toys representing animals or non-human creatures, other. The rate of duty will be 8 percent ad valorem.

The applicable subheading for the hand magnifier will be 9013.80.2000, Harmonized Tariff Schedule of the United States (HTS), which provides for hand magnifiers, magnifying glasses, loupes, thread counters and similar apparatus. The rate of duty will be 6.6 percent ad valorem.

The applicable subheading for the toy crocodile will be 9503.49.0025, Harmonized Tariff Schedule of the United States (HTS), which provides for toys representing animals or non-human creatures, other, toys. The rate of duty will be free.

The applicable subheading for the toy lantern will be 9503.90.0045, Harmonized Tariff Schedule of the United States (HTS), which provides for other, other toys and models. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Barbara Kiefer at 212-466-5685.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA-2 RR:CR:GC 961254 MMC
Category: Classification
Tariff No. 9503.90.0045

MR. MICHAEL K. TOMENGA
NEVILLE, PETERSON & WILLIAMS
1233 20th Street, N.W., Suite 500
Washington, DC 20036

Re: Peter Pan Spyglass; NYRL C81752 modified.

DEAR MR. TOMENGA:

This is in reference to your January 6, 1998, letter requesting reconsideration of New York Ruling Letter (NYRL) C81752 dated December 9, 1997. In NYRL C81752, the Director, Customs National Commodity Specialist Division, New York, held an article described as a "Peter Pan Spyglass" to be classifiable in subheading 9005.80.4040, of the Harmonized Tariff Schedule of the United States (HTSUS), as an optical telescope. A sample was submitted for our review. We have reconsidered this classification and believe that it is incorrect.

Facts:

The "Peter Pan Spyglass" is a hand held plastic article which measures 4 1/4 inches tall and 4 1/2 inches wide at its widest point. A figure of Captain Hook is molded into its handle. The item functions as an optical telescope. Objects viewed through this optical telescope (monocular) are magnified. The spyglass will be used as a prize in a fast food restaurant children's meal.

Issue:

Whether the "Peter Pan Spyglass" is classifiable as a toy under heading 9503, HTSUS, or as an optical telescope under heading 9005, HTSUS.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The headings under consideration are as follows:

- | | |
|------|---|
| 9005 | [b]inoculars, monoculars, other optical telescopes, and mountings therefor; other astronomical instruments and mountings therefor, but not including instruments for radio-astronomy; parts and accessories thereof |
| 9503 | [o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof |

Note 1(k) of Chapter 90, HTSUS, states that: "[t]his chapter does not cover: * * * [a]rticles of chapter 95." Therefore, we must first determine whether the "Peter Pan Spyglass" is classifiable as a toy for tariff purposes. If so, it is excluded from classification in heading 9005, HTSUS, by operation of Note 1(k) to Chapter 90.

The term "toy" is not defined in the HTSUS. However, in understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See, T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The ENs to Chapter 95 state, in pertinent part, that "[t]his chapter covers toys of all kinds whether designed for the amusement of children or adults." Although not set forth as a definition of "toys," we have interpreted the just-quoted passage from the ENs as equating "toys" with articles "designed for the amusement of children or adults." Furthermore, EN 95.03 states, in pertinent part, that "[c]ertain toys (e.g., electric irons, sewing ma-

chines, musical instruments, etc.) may be capable of a limited 'use'; but they are generally distinguishable by their size and limited capacity from real sewing machines, etc." Finally, we believe such design for the amusement of children or adults must be corroborated by evidence of the articles' principal use.

When the classification of an article is determined with reference to its principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context which otherwise requires, such use is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In other words, the article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the Court in *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), cert. denied, 429 U.S. 979, provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use.

The physical characteristics of the "Peter Pan Spyglass", mainly its plastic lenses and form as well as its bright colors and childhood theme, appeal to a sense of fun and play. The article is designed as a tool to pretend to be a pirate. While it does function, its function is limited by its size and constituent material. The "Peter Pan Spyglass" is described by both heading 9005, HTSUS, and heading 9503, HTSUS. By operation of Note 1(k) to Chapter 90, it therefore is excluded from classification in heading 9005, HTSUS.

Holding:

The "Peter Pan Spyglass" is classified under subheading 9503.90.0045, HTSUS, which provides for "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: [o]ther: [o]ther toys and models," with a general 1998 column one duty rate of free.

NYRL C81752 is modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ABSORPTION LIQUID CHILLERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of absorption liquid chillers. These are natural gas-fired apparatus used to produce both chilled water and hot water for space cooling and heating applications. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before December 18, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of absorption liquid chillers. Customs invites comments on the correctness of the proposed revocation.

In HQ 952808, dated February 16, 1993, direct-fired absorption chiller/heaters, imported without a burner and fan for distributing the air and for changing humidity, were held to be classifiable in subheading 8415.90.00, HTSUS, a provision for parts of air conditioning machines. This ruling was based on evidence that the apparatus was principally used to produce chilled water for space cooling in apartments, hotels, offices and other commercial buildings, and the fact that, as imported, the apparatus was not considered an unfinished air conditioning machine for tariff purposes. HQ 952808 is set forth as "Attachment A" to this document.

It is now Customs position that this apparatus has the capability of producing temperatures which the industry recognizes as required for refrigeration. Refrigerating or freezing equipment is classifiable in subheading 8418.69.00, HTSUS. HQ 962279 revoking HQ 952808 is set forth as "Attachment B" to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 28, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 16, 1993.

CLA-2-CO:R:C:M 952808 JAS
Category: Classification
Tariff No. 8415.90.00, HTSUS

DISTRICT DIRECTOR OF CUSTOMS
1000 Second Avenue, Suite 2200
Seattle, WA 98104-1049

Re: Absorption chiller/heater; apparatus for producing chilled water and hot water; refrigerating/freezing apparatus; Subheading 8418.69.00, HTSUS; parts of apparatus principally used for commercial comfort cooling; Section XVI, Note 2, HTSUS; Internal Advice 30/92.

DEAR SIR:

In a memorandum dated April 21, 1992 (CLA-2 SE:C:DKB), you requested advice on the classification of the **Trane** Thermachill direct-fired absorption chiller/heater from Japan.

Facts:

The absorption chiller/heater in issue is a natural gas-fired apparatus used to produce chilled water and hot water for space cooling and heating applications. Apparatus of this type operates without a compressor and consists essentially of a burner (instead of the conventional steam or hot water generator), condenser, evaporator, cooling tower, absorption unit, circulation pump, and heat exchanger. The burner in this case is added after importation.

In operation, the burner heats a solution of water and lithium bromide, causing the lithium bromide to vaporize and the water to remain behind. The vapor condenses in the condenser, with the resulting liquid moving to the evaporator where it evaporates again, absorbing heat in the process. The heated water is passed through the heat exchanger where it gives off some of its heat. The water then goes to the absorption unit where it absorbs the lithium bromide vapor from the evaporator. The solution is pumped back through the heat exchanger which absorbs more heat. The cooling tower consists of water sprays, overflow tubes, valves and a water pump. It functions to cool condenser and absorption unit water.

Chilled water produced by this apparatus is pumped directly to the building's cooling/heating circulation system. Fans or blowers built into the building's master system, or in individual room units distribute the coolness. These fans are not part of this importation. Humidity is added by condensation as hot air passes over cooler fins in the room units.

The absorption liquid chiller was entered under the provision for air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity, in subheading 8415.82.00, Harmonized Tariff Schedule of the United States (HTSUS).

Because the importation lacks a fan, you question whether the entered provision is correct, or whether the provision for refrigerators and other refrigerating or freezing equipment, in subheading 8418.69.00, HTSUS, may be the appropriate classification. Absorption liquid chilling units are provided for statistically under this subheading. You indicate there are no known rulings on this merchandise under the HTSUS.

Issue:

Whether the absorption liquid chillers in issue are goods of heading 8418; whether they are unfinished or incomplete air conditioners of heading 8415, or parts under the same heading.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

In accordance with GRI 2(a), any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article.

Goods qualifying as parts of machines and apparatus of section XVI are classified in accordance with **section XVI, note 2, HTSUS**.

As a preliminary issue, a machine of chapter 84 that is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose. **Chapter 84, note 7, HTSUS**. Submitted literature repeatedly refers to this unit as a "chiller" and identifies apparatus for making "chilled" water with the energy of natural gas. The file also reflects that in climates where freezing or near freezing temperatures are encountered, the hot water produced by these absorption chillers is not sufficient for space heating. In such cases chiller/boiler combinations are required. Hot water produced by the chiller is fed to the boiler as an energy-saving measure. The available evidence indicates that while this gas-fired liquid absorption chiller produces hot water in a reverse flow cycle, its principal purpose is to produce chilled water for space cooling in apartments, hotels, offices and other commercial buildings.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the Customs Cooperation Council's official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. **See T.D. 89-80**.

Relevant **ENs**, at p. 1169, indicate that refrigerators and refrigerating equipment of heading 8418 are in the main machines or assemblies of apparatus for the production, in a continuous cycle of operations, of low temperatures (in the region of **0 degrees C or less**) at the active cooling element, by the absorption of the latent heat of evaporation of liquified gases (e.g., **ammonia**, halogenated hydrocarbons), of volatile liquids or, in the case of certain marine types, of water (Emphasis added). Absorption type refrigerators that operate essentially as indicated above are described in the **ENs** at p. 1170. These utilize an aqueous solution of ammonia as the absorbent and water as the refrigerant. Industry sources we have consulted indicate that ammonia used as the absorbent produces temperatures of 0 degrees C and below required for refrigerating and freezing applications. However, the absorption liquid chiller models in issue here use lithium bromide as the absorbent, and produce water temperatures as low as 43 degrees F (8 degrees C). We are advised that lithium bromide will not produce temperatures which the industry recognizes as required for

refrigeration. We conclude, therefore, that the absorption liquid chillers in issue here are not provided for in heading 8418.

The next issue is whether the absorption liquid chillers in issue are unfinished articles of heading 8415 or parts of the same heading. In general, air conditioning machines keep the temperature and humidity of the air in closed spaces at values which provide a sense of comfort to humans. Relevant **ENs** at p. 1165 indicate that heading 8415 applies only to machines equipped with a motor-driven fan or blower that are designed to change both the temperature (a heating or cooling element or both) and the humidity (a humidifying or drying element or both) of air. The humidifying element may be separate from the heating/cooling element, or the two may be incorporated in a single unit. Thus, an importation consisting of a liquid chiller of the type under consideration and multiple room units that each incorporate a fan and element for changing humidity, would be the components that comprise a complete air conditioning machine of heading 8415. However, we conclude that an importation consisting of an absorption liquid chiller without a burner, and also without a fan for distributing air and an element for changing humidity, lacks the essential character of an air conditioning machine of heading 8415. This is because the burner initiates the entire process by firing the absorption refrigeration cycle and the fan is necessary for moving the air to the space to be cooled. However, owing to the function it performs, the absorption liquid chiller in issue, even without the burner, is an integral, constituent and component part necessary to the completion and proper operation of an air conditioning machine of heading 8515.

Noting the previous discussion of heading 8418, the absorption liquid chiller is not a good included in any heading of chapters 84 or 85. **Section XVI, note 2(a), HTSUS.** Owing to its use of the lithium bromide solution to produce temperatures as low as 43 degrees F, we conclude it is a part suitable for use solely or principally with machines or apparatus of heading 8415. **Section XVI, note 2(b), HTSUS.**

Holding:

Under the authority of GRI 1, HTSUS, the **Trane** liquid absorption chillers are parts of air conditioning machines of heading 8415. Actual classification is in subheading 8415.90.00, HTSUS, parts of air conditioning machines.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 962279 JAS
Category: Classification
Tariff No. 8418.69.00

TRANE COMPANY, INC.
COMMERCIAL SYSTEMS GROUP
3600 Pammel Creek Road
LaCrosse, WI 54601-7599

Re: *HQ* 952808 Revoked; THERMACHILL direct-fired absorption chiller/heater; unfinished apparatus for producing chilled water and hot water; GRI 2; refrigerating equipment, parts of apparatus for commercial comfort cooling; air conditioning machines and parts, Heading 8415; *HQ* 952361.

DEAR SIRs:

In *HQ* 952808, dated February 16, 1993, we responded to a request by the District (now Port) Director of Customs, Seattle, WA, initiated as Internal Advice 30/92, and advised that the **Trane** THERMACHILL absorption chiller/heater was classifiable in subheading 8514.90.00, Harmonized Tariff Schedule of the United States (HTSUS), as other parts of

air conditioning machines. We have reconsidered this decision and now believe that it is incorrect.

Facts:

The absorption chiller/heater in issue is a natural gas-fired apparatus used to produce chilled water and hot water for space cooling and heating applications in commercial buildings. Apparatus of this type operates without a compressor and consists essentially of a burner (instead of the conventional steam or hot water generator), condenser, evaporator, cooling tower, absorption unit, circulation pump, and heat exchanger. The burner in this case is added after importation. The operation of this apparatus, as described in HQ 952808, is incorporated by reference in this decision. Likewise, for the reasons stated in HQ 952808, we have determined that the principal purpose of a complete absorption chiller/heater is to produce chilled water. Chilled water produced by this apparatus is pumped directly to the cooling/heating circulation system of commercial buildings. Fans or blowers built into the building's master system, or in individual room units distribute the coolness. These fans are also not part of this importation. Humidity is added by condensation as hot air passes over cooler fins in the room units. We are informed that a complete liquid chiller of the type in issue can produce chilled water as low as 43 degrees F.

The apparatus was entered under a provision in HTS heading 8415 for air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity. However, because the importation lacked a fan, the issue arose whether the entered provision was correct, whether the provision for other refrigerating or freezing equipment, in HTS heading 8418, may be the appropriate classification, or whether the apparatus is a part either of heading 8415 or heading 8418.

The provisions under consideration are as follows:

8415	Air conditioning machines * * *; parts thereof:
8415.81.00	Incorporating a refrigerating unit and a valve for reversal of the cooling/heat cycle
8415.82.00	Other, incorporating a refrigerating unit
8415.90	Parts:
8415.90.80	Other
8418	[o]ther refrigerating or freezing equipment, electric or other; parts thereof:
8418.69.00	Other
	Parts:
8418.99.80	Other

Issue:

Whether an absorption liquid chiller/heater, as described, is incomplete or unfinished refrigeration equipment, or a part thereof.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Under GRI 2(a), heading descriptions are to include incomplete or unfinished articles provided they have the essential character of the complete or finished good. Under GRI 3(a), where a good is, *prima facie*, described in two or more headings, it is to be classified in the heading which provides the most specific description.

The **Harmonized Commodity Description and Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

In HQ 952808, heading HTS 8418, other refrigerating or freezing equipment, was essentially eliminated from consideration, based on certain ENs for that heading. Those notes stated that the equipment of heading 8418 in the main produces low temperatures (in the region of 0 degrees C or less) at the active cooling element. Information available to us at the time indicated that absorption liquid chillers using lithium bromide as the absorbent

produce water temperatures as low as 43 degrees F (8 degrees C), a temperature which the industry does not recognize as required for refrigeration.

However, we note the term *refrigeration* is not defined by any legal note in the HTSUS and the temperature range stated in the heading 8418 ENs i.e., in the region of 0 degrees C or less, applies to the equipment "in the main." We note as well that the 8418 ENs describe Absorption Type Refrigerators on p. 1268, which consist essentially of a burner instead of a generator, a condenser, evaporator, and absorption unit, and on p. 1269 list as apparatus of the foregoing kind refrigerated water or beverage fountains and beer coolers. Neither of these apparatus operates in a continuous cycle of operation in the region of 0 degrees C or less. Similarly, in HQ 952361, dated August 18, 1992, temperature-controlled wine storage units were classified in an appropriate subheading of heading 8418. Thus, the referenced ENs describe the absorption liquid chillers in issue, but are not specific enough as to the requisite temperature ranges to be conclusive in defining refrigerators and refrigerating equipment for purposes of heading 8418. In such cases, tariff terms are to be construed according to their common and commercial meanings, which are presumed to be the same. How a term is used within an industry has been regarded as a particularly authoritative source of its common meaning. The 1998 ASHRAE handbook *REFRIGERATION*, published by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc., states in the introductory language of Chapter 43 under LIQUID CHILLING SYSTEMS, that the most frequent application for liquid chilling systems is for air conditioning systems, although both brine cooling for low-temperature refrigeration and chilling of fluids in industrial processes are also common. This source also states that in the refrigeration cycle of modern water-lithium bromide chillers, chilled water enters the cooler at 54 degrees F, for example, and leaves at 44 degrees F. From this, we can reasonably conclude that apparatus which produces chilled water at 44 degrees F is regarded as refrigerating equipment for purposes of heading 8418.

From the discussion above, as well as the finding in HQ 952808 concerning heading 8514, it is apparent that the absorption liquid chillers in issue, imported complete or finished, are, *prima facie*, classifiable in heading 8415 and in heading 8418. Under GRI 3(a), they are to be classified in the heading that provides the most specific description. Specificity is often resolved in favor of the heading which most narrowly and definitively describes the good, or which imposes conditions which are the most difficult to satisfy. Refrigeration necessarily involves air conditioning, but the latter term relates to temperature limits which provide a sense of comfort for human beings, without any other defining characteristics. Noting the discussion of the heading 8418 ENs and the types of apparatus listed in those notes, as well as the fact the chillers operate at temperatures required for refrigeration, we conclude that heading 8418 provides a more specific description for the absorption liquid chillers than does heading 8415. The absorption liquid chillers here consist of all the components necessary to constitute refrigeration apparatus of heading 8418, except for the burner. Nevertheless, for purposes of GRI 2(a), the apparatus, as described, contains the aggregate of distinctive component parts that establish the identity of the merchandise as what it is, complete or finished refrigeration equipment.

Holding:

Under the authority of GRI 3(a), HTSUS, the **Trane** liquid absorption chiller/heaters are provided for in heading 8418. They are classified in subheading 8418.69.00, HTSUS. HQ 952808, dated February 16, 1993, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

**PROPOSED REVOCATION OF RULING LETTERS RELATING TO
TARIFF CLASSIFICATION OF "SOBAKAWA" PILLOW" FLAX
SEED EYE MASK**

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the "Sobakawa" pillow" flax seed eye mask, under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received December 18, 1998.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, Office of Regulations and Rulings (202) 927-2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke NY B86429 to reflect the proper classification of "Sobakawa" pillow" flax seed eye mask in subheading 1204.00.0090, HTSUS, as flaxseed.

In NY B86429, dated June 23, 1997, Customs ruled that the "SOBAKAWA" Pillow" flax seed eye mask was classified in subheading 3005.90.5090, HTSUS, the residual provision for wadding, gauze, bandages and similar articles. NY B86429 is set forth as Attachment A to this document.

It is now Customs position that this product should be classified in subheading 1204.00.0090, HTSUS, as flaxseed. The product is not a "similar article" to those enumerated in heading 3005, HTSUS, nor is the product for medical, surgical, dental or veterinary purposes, as is true of articles classified in heading 3005, HTSUS. The essential character of the product is provided by the flaxseed, thus it is classified in subheading 1204.00.0090, HTSUS, the provision for "flaxseed". Proposed Headquarters Ruling Letter (HQ) 962310, revoking NY B86429, is set forth as Attachment B to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 2, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, June 23, 1997.
CLA-2-30:RR:NC:2:238 B86429
Category: Classification
Tariff No. 3005.90.5090

MS. CECILIA CASTELLANOS
WESTERN OVERSEAS CORPORATION
P.O. Box 90099
Long Beach, CA 90809-1345

Re: The tariff classification of a **Flax Seed Eye Mask** from China.

DEAR MS. CASTELLANOS:

In your letter dated June 12, 1997, on behalf of your client, Yanko Herb, Inc., you requested a tariff classification ruling.

The subject product, described on the accompanying insert as a "SOBAKAWA™ Pillow" flax seed eye mask, consists of a small, sealed pouch, which is constructed from woven fabric and filled with flax seeds (7.5 oz.). According to the instructions on the insert, the individual, after lying down or reclining, places the pouch, mask-like, across the bridge of the nose and over the eyes, in order to rest and soothe tired, irritated, puffy eyes. It can also be chilled in a freezer, prior to use. The product is put up for retail sale in a sealed polybag. The sample is being returned, pursuant to your request.

The applicable subheading for the subject product will be 3005.90.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes: Other: Other: Other." The rate of duty will be free.

This merchandise may be subject to the requirements of the Federal Food, Drug, and Cosmetic Act, which is administered by the U.S. Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, MD 20857, telephone number (301) 443-6553.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Cornelius Reilly at 212-466-5770.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 962310 MGM
Category: Classification
Tariff No. 1204.00.0090

MS. CECILIA CASTELLANOS
EXECUTIVE VICE PRESIDENT
WESTERN OVERSEAS CORPORATION
P.O. Box 90099
Long Beach, CA 90809-0099

Re: "SOBAKAWA"™ Pillow" Flax Seed Eye Mask; Revocation of NY B86429.

DEAR MS. CASTELLANOS:

This is in reference to New York Ruling Letter (NY) B86429, issued to you on June 23, 1997, in response to your letter of June 12, 1997, on behalf of Yanko Herb, Incorporated. In NY B86429, Customs ruled that the "SOBAKAWA"™ Pillow" flax seed eye mask was classified in subheading 3005.90.5090, Harmonized Tariff Schedule of the United States (HTSUS), the residual provision for wadding, gauze, bandages and similar articles. We have reconsidered this classification and believe that it is incorrect.

Facts:

The "SOBAKAWA"™ Pillow" consists of a small, sealed pouch, which is constructed from woven fabric and filled with flax seeds (7.5 oz.). According to the instructions on the insert, the individual, after lying down or reclining, places the pouch, mask-like, across the bridge of the nose and over the eyes, in order to rest and soothe the eyes. It can also be chilled in a freezer prior to use. The product is put up for retail sale in a sealed polybag.

Issue:

What is the proper tariff classification of the "SOBAKAWA"™ Pillow" flax seed eye mask?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRI) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRI and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRI taken in their appropriate order. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See, T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

Heading 3005, HTSUS, provides as follows:

- 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine*." *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exemplars of this heading is their direct application to an ailing portion of the body. The "SOBAKAWA"™ Pillow" flax seed eye mask is not designed or marketed for such a purpose and is therefore not "a similar article." Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." While the instant product does pur-

port to soothe the eyes, such action does not amount to medical treatment of an ailment, thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading of the nomenclature encompass the "SOBAKAWA ~ Pillow" flax seed eye mask. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2 (b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * *. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3(b) states that goods which are *prima facie* classifiable under two or more headings and are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Thus, the "SOBAKAWA ~ Pillow" flax seed eye mask is classified in either heading 1204, HTSUS, as flaxseed, or one of the headings of Section XI (textiles), whichever provides the essential character.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the flax seeds provide the greater part of the item's bulk and weight. In addition, they are understood to perform the primary soothing function. Thus, the essential character of the "SOBAKAWA ~ Pillow" flax seed eye mask is found in the flax seeds and it is classified in heading 1204, HTSUS.

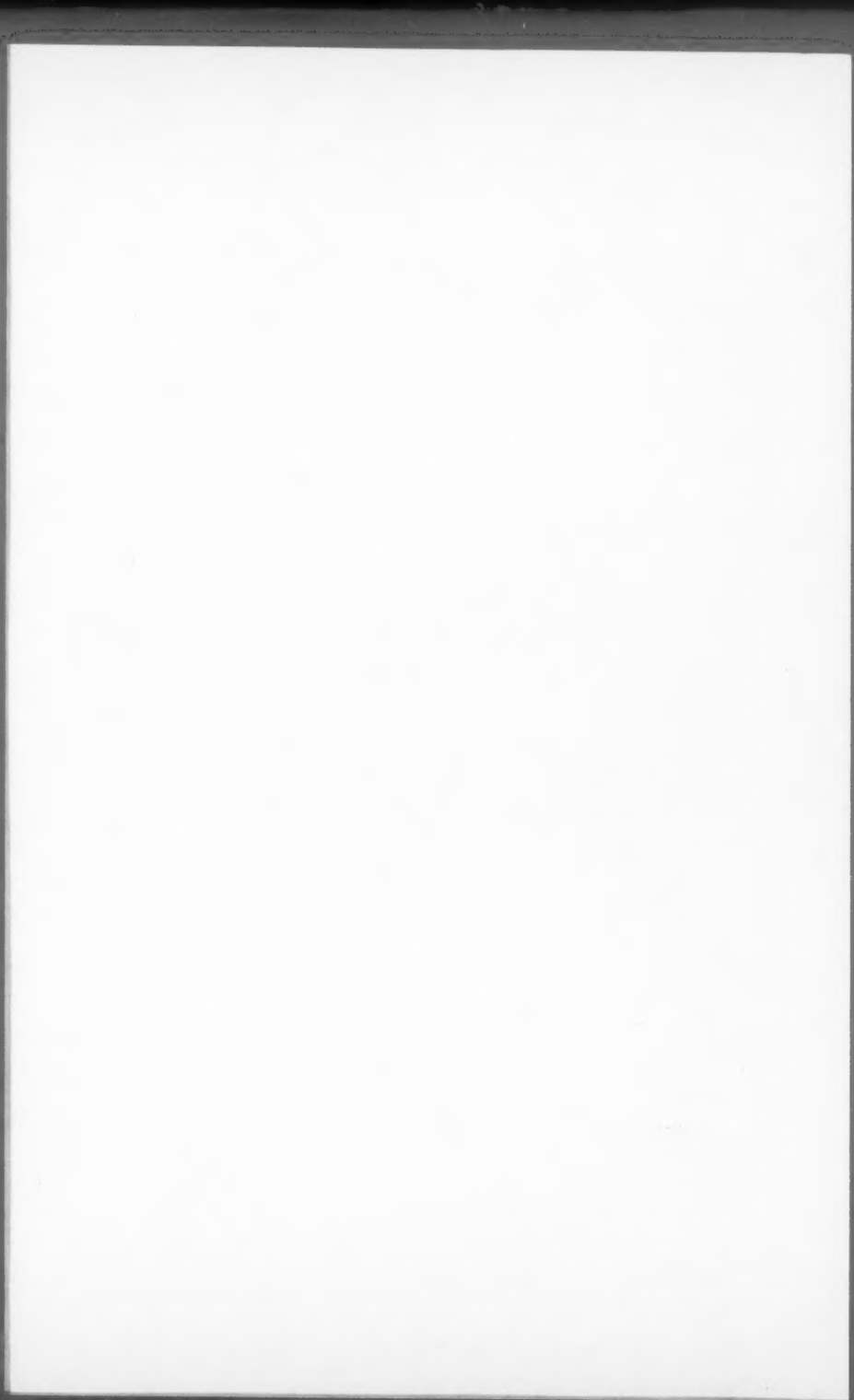
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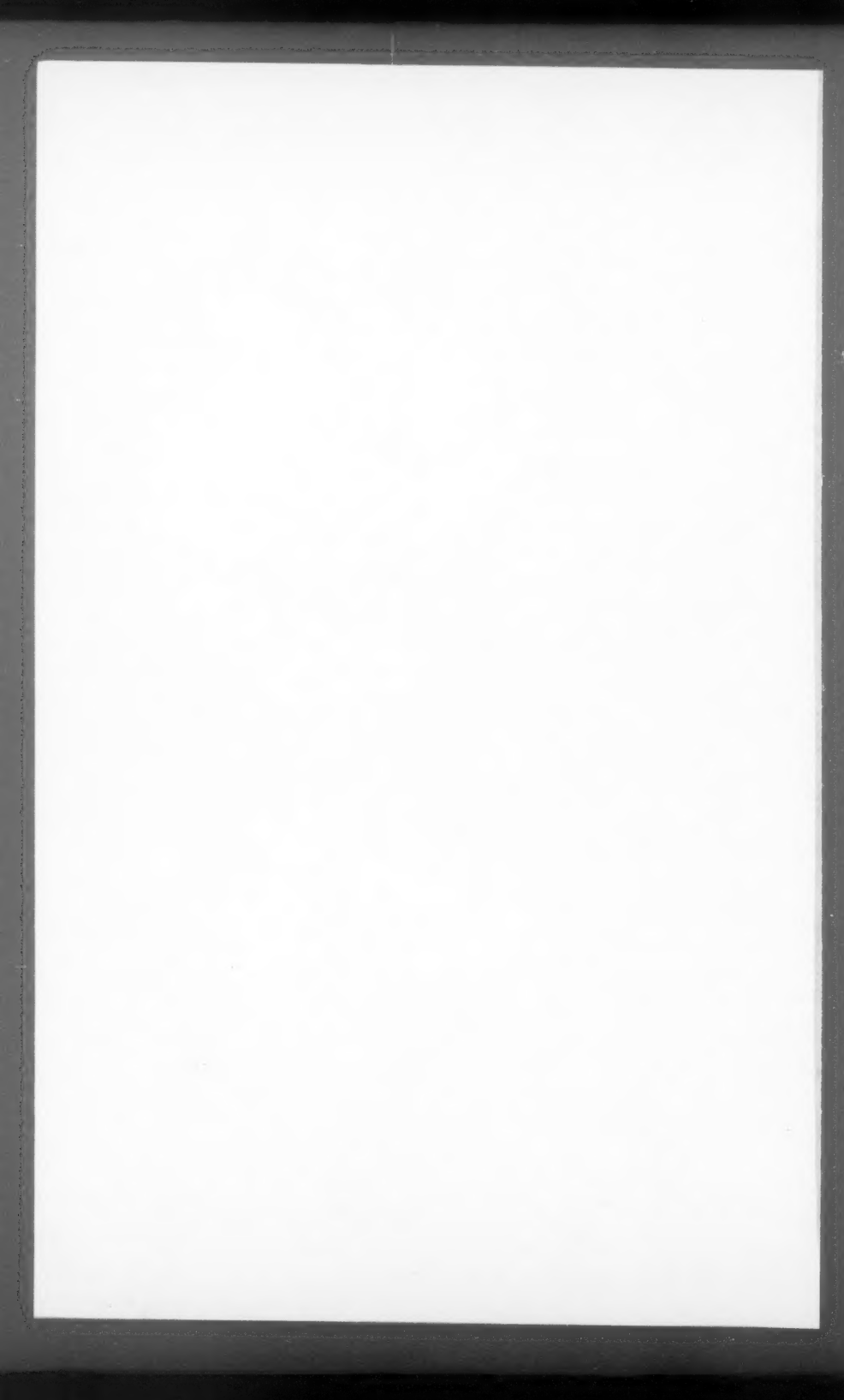
The "SOBAKAWA ~ Pillow" flax seed eye mask is classified in subheading 1204.00.0090, HTSUS.

NY B86429 is REVOKED.

JOHN DURANT,
Director,
Commercial Rulings Division.







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